IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943

NO. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS
Petitioner

V.

J. E. DILWORTH COMPANY and REICHMAN-CROSBY COMPANY
Respondent

NO. 312

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Petitioner

V.

BINSWANGER AND COMPANY
Respondent

## BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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BINSWANGER AND COMPANY.

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### STATEMENT OF THE CASE

The statement of the case set forth in Petitioners' brief (Page 1-3) is substantially correct, with the exception of the last two sentences thereof. (Page 3). We contend that the decision of the Arkansas Supreme Court

herein was not, as stated by opposing counsel, "Predicated upon the conclusions of the Court, * * * * that a sales tax could not be levied upon transactions of the sort here involved because it would be a burden on interstate commerce and, therefore, in violation of the Commerce Clause of the Constitution of the United States." The Court simply held that the case was controlled by its prior decision in *Mann vs. McCarroll*, 198 Ark. 628, 139 S.W. 2d 721 (R. 25-26), in which the question of interstate commerce was not in anywise involved. Such being true, a federal question is not here involved.

## SUMMARY OF ARGUMENT

The tax levied under Acts 154-1937 and 386-1941, cannot be applied to extra-territorial sales. The tax is applicable only to the "gross proceeds" of "Sales at retail within the state."

Judicial interpretation of the taxing Acts by the Supreme Court of Arkansas limits application to "Retail sales within the state."

The judgment of the Supreme Court of Arkansas (R. 22) affirmed the decree of the Pulaski Chancery Court (R. 19), which held that under facts presented by bill and answer, "Plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff." Therefore, neither the judgment of the Chancery or Supreme Court affirmatively shows that a federal question was necessarily involved, or decided.

## ARGUMENT

### POINT No. I.

### THE TAXING ACTS ARE LIMITED IN APPLICATION TO SALES MADE WITHIN THE STATE OF ARKANSAS.

(a) The Statutes.

Section 1 of Act 154 of 1937 (App. 15) is:

"Section 1. Title. The title of this Act shall be, 'The Arkansas Retail Sales Tax Law'."

Section 4 (App. 17) is:

"Section 4. The Tax. There is hereby levied upon and shall be collected from all retail sales, as herein defined, a tax of two per cent (2%) of the gross proceeds derived from said sales."

A sale at retail is defined in Section 3 (b) as follows, (App. 15):

"1. The term 'sale at retail' shall mean any transaction, transfer, exchange, or barter by which is transferred for a consideration, the ownership of any personal property, thing, commodity and/or substance, and/or the furnishing or selling for a consideration, any of the substances and things hereinafter designated and defined, when such transfer, exchange, or barter is made in the ordinary course of the transferror's business and is made to the transferee for the consumption or use or for any other purpose than for resale."

Section 3 (d) provides (App. 16):

"The term 'gross proceeds' shall mean the amount received in money, credits, property or any other money's worth in consideration of *sales at retail within this State* without any deduction on account of the cost of the property sold, the cost of materials used, or any other expense whatsoever, nor shall any deduction be allowed for losses."

Section 3 (e) (App. 16) defines:

"The term 'retailer' shall mean any person, persons, partnerships, firm or corporation engaged in 'sales at retail'."

Section 4 (E) (App. 17) further reveals the legislative intent:

"(E) Where there are adjoining cities or incorporated towns which are separated by a State line, the taxes and licenses to be paid by dealers in and on sales and services in such adjoining city or incorporated towns on the Arkansas side of the State line shall be at the same rate as provided by law in such adjoining State, if any, not to exceed the rate provided in this Act."

Therefore, as is perfectly obvious, the tax is laid on, and limited to, the "gross proceeds" derived from "Sales at retail within this state;" and the "Tax Collector" is the "Retailer" who is defined as any person engaged in "Sales at retail" (within this state).

Necessarily, then, the Legislature having specifically said that the tax be laid on sales within the state, it would follow that a sale made without the state would be excluded. That such was the intent is further evidenced by the provisions of Section 4 (E), (last quoted), which is by way of exception and in recognition of the existence of the situation here presented; but the exception is limited to cities located on state lines.

The Supreme Court of Arkansas said that the tax levied under Act 386-1941 was of the same kind and character as that levied under Act 154-1937. (R. 26). Moreover, Article 1 of the regulations promulgated by the Commissioner under Act 386 of 1941, (inadvertently

omitted from the Record by Petitioner), provides as follows:

> "Amount and nature of tax—by whom paid, by whom collected. The tax levied by the Act is two per cent of the gross proceeds or gross receipts derived from all sales *within this state.*"

Act 386 does not, either in express terms or by implication, purport to tax sales of personal property which are made in another state, in which the transmutation of both the title and possession takes place, even though the property, pursuant to the sale, or as a result of the sale, is brought into the state. To the very contrary, the express terms of the Act show conclusively that the Legislature did not intend to tax such sales, and the provisions of the Act are inapplicable to such sales. For this reason, the Federal Commerce clause could never be involved.

Specific taxes are levied on "gross receipts derived from sales." The term "seller" is defined to mean "every person making a sale in an established business as here defined." And the term "established business" is defined to mean "any business operated or conducted by any person in a continuous manner for any length of time from an established place and in an established manner." This definition contemplates an established place of business in Arkansas. Assuredly, it could not be held to mean places of business in the other forty-seven states, for the Legislature has no power over such businesses; and the presumption is that it did not intend, or attempt, to exercise a power which it did not possess.

Again, Section 6 (App. 42) requires "Sellers" to keep records in this state. As the Legislature lacked power

to require "Sellers" who had no established places of business in the state to keep their records therein, the presumption is that it was intended to tax only those sellers who have established places of business in Arkansas and where all of their actual business operations are conducted, but who have executive or managerial offices outside the state where their general records are kept.

Section 7 (App. 43-44) provides that a seller of admissions to places of amusement, whether for entertainment or for recreational or athletic events, shall pay the tax imposed by the Act. In the very nature of things, this could not apply to places of amusement beyond state confines, and the Legislature did not intend it to so apply.

In this connection, we call particular attention to a somewhat curious feature of the complaint filed in the Chancery Court. (R-13). Therein it is alleged:

> "The defendant, Reichman-Crosby Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this state, *but it engages in business activity as defined by Regulation No.* 16, *promulgated under Act No.* 154 *of* 1937, *as amended and as defined by Article* 27 *of the regulations promulgated under Act No.* 386 *of* 1941."

This allegation utterly ignores the terms of the taxing Acts and predicates the right of recovery on the terms of Article 27 of the regulations promulgated by the Commissioner under Act 386. Such regulation goes far be-

yond the terms of the Act, and was designed and specifically drafted in an effort to make extra-territorial sales taxable. No warrant for the regulation can be found in the Act itself.

In *Mann vs. McCarroll,* 198 Ark. 628, defendant, Mann, alleged "that Act 154-1937 did not authorize the levy or collection of a sales tax—on property purchased in other states for *use* in Arkansas." He further alleged, "But, on the contrary, that the levy of the tax was upon retail sales only." (Pg. 631). Intervenors, Howe, designedly and purposely alleged that the Act as interpreted and attempted to be applied by the Commissioner "would be wholly void as a sales tax for the reason that the state is without power to levy a tax upon sales, or purchases, made beyond its jurisdiction, or upon sales, or purchases, of goods in other states which thereafter entered interstate commerce." Thus, the principal issues were presented. First, the "use tax"; and, secondly, that the Act could not be held applicable to extra-territorial sales because it was limited in application to "sales within the state." The Court disposed of these principal issues by holding, (1) that Section 4 (f) did not provide a use tax; and (2) that the Act, viewed in its entirety, applied only to "sales at retail within the state." Therefore, merely by a process of elimination, the interstate commerce question was not reached, or decided, and the very cornerstone and foundation of the decision is the statement of the Court that "The only tax, therefore, that is imposed is a sales tax." (Pg. 636). Most assuredly, then, the power or intent of the State to tax a sale consummated beyond territorial limits, even though the property involved was subsequently transported therein for

use and consumption, was expressly and positively denied.

We further submit that in the *Mann case*, in the use of the following language quoted therefrom, the Court expressly said that the tax levied under Act 154 did not apply to sales such as are involved in the case at bar. (Pg. 639-640):

> "It is also argued that merchants are entitled to have this construction placed upon this Act of the Legislature for their protection, in order that local citizens will not make purchases abroad in order to avoid the sales tax. We acknowledge the forcefulness and cogency of these statements and the only answer we desire to make to them is that they are proper arguments to be made to the legislative assemblies, and they become proper to present to judicial tribunals only when it is apparent from the language of the Act itself that it was the legislative intent so to safeguard the public revenues and to protect one class of its citizens against the alleged wrong doing by others in the evasion of taxes by trading in tax-free areas.
>
> "Our attention has been called to the fact that the Legislature was not unmindful that people might be tempted to trade in other states in order to avoid the taxes imposed. Provisions have been made for the reduction of taxes where the local citizen could secure an advantage by merely going across the state line to make his purchases. Our attention has heretofore been called to certain matters of this kind and has been given due consideration, but they are problems for legislative solution and not for correction by judicial interpretation. *Wiseman v. Phillips*, 191 Ark. 63, 84 S.W. 2d 91. *Kibler v. Parker*, 191 Ark. 475, S.W. 2d 925."

This Court will realize, of course, that in considering the case at bar, the Arkansas Supreme Court had access to, and took judicial knowledge of, the record in the Mann case, and that it presented for decision not only the application of the alleged "use tax provision" (Section 4 (f) - 154), but also the positive question presented by intervenors, Howe, whether the Act could be held to apply to sales consummated extra-territorially. If, as we contend, that was the principal question decided in the Mann case, and that it did not involve, or have any relation to the interstate commerce question, and if, as stated in the opinion, the case at bar is controlled by the Mann case, then it should necessarily follow that the instant case does not present a federal question. Seemingly, it should not be necessary to argue that the federal question was not considered or decided in the Mann case. Judge Baker said:

> "As we have heretofore stated, it is conceded that if this provision of the Act must be treated as a sales tax on sales made in other states, it is illegal and unenforceable."

This statement was made by the writer of the opinion to serve but one purpose, that is, to show that on presentation of the case, it was agreed by all parties that the interstate commerce question was neither presented for decision, nor decided. In fact, the opinion concluded with the following statement:

> "From what we have said, we think the other interesting questions stated in the beginning of this opinion need not be discussed."

## POINT II.

## THE DECISION OF THE ARKANSAS SUPREME COURT IS NOT, OF NECESSITY, BASED ON AN INTERPRETATION, OR DETERMINATION, OF THE COMMERCE CLAUSE.

It is settled that before this Court can pronounce a judgment of a State Court to be in conflict with the Federal Constitution, it must be made to appear that the decision sought to be reviewed did, of necessity, involve determination of the federal question.

In *Adams vs. Russell*, 229 U. S. 353, 59 L. ed. 1224, 33 S. Ct. 846, it is said:

> "In *Bachtel v. Wilson*, 204 U.S. 36, 41, 42, 51 L.ed. 357, 359, 360, 27 Sup. Ct. Rep. 243, we said, by Mr. Justice Brewer, that before we can pronounce a judgment of a State Court to be 'in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was.' The case involved the consideration of a state statute which presented two questions, one of which, at least, presented no matter of a Federal nature, and in respect to each of which something might be said one way and the other, and until it was shown what the Supreme Court did in fact decide, it was impossible to hold that the section as construed by it was in conflict with the Federal Constitution. Under these circumstances, it was held that this Court had no jurisdiction, and the writ of error was dismissed. *Johnson v. Risk*, 137 U.S. 300, 34 L.ed. 683, 11 Sup. Ct. Rep. 111, was cited. No opinion was given by the State Court in *Bachtel v. Wilson*, nor in the cited case. In neither case, therefore, did the record disclose the specific ground upon which the

Court proceeded. In such case, we said in *Johnson v. Risk*, by Mr. Chief Justice Fuller, that when the application of a state statute in a matter purely local was involved, if a plaintiff in error wished to claim that the cause was disposed of by the decision of a Federal question, he should obtain the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact. *DeSaussure v. Gaillard*, 127 U.S. 216, 32 L.ed. 125, 8 Sup. Ct. Rep. 1053, was adduced as deciding that to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, *or that the judgment as rendered could not have been rendered without deciding it.*"

In *Arkansas Southern Railway Co. vs. German National Bank*, 207 U.S. 270, 52 L.ed. 201, 28 Sup. Ct. 78, Mr. Justice Holmes, in speaking for this Court, said:

"But, according to the well-settled doctrine of this Court with regard to cases coming from State Courts, unless a decision upon a Federal question *was necessary to the judgment*, or in fact was made the ground for it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question *is made a ground, if the judgment also is supported upon another which is adequate by itself*, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. *Murdock v. Memphis*, 20 Wall. 590, 22 L.ed. 429; *Hale v. Akers*, 132 U.S. 554, 33 L.ed. 442, 10 Sup. Ct. Rep. 171; *Leathe vs. Thomas*, Nov. 11, 1907 (207 U.S. 93, ante, 30, 28 Sup. Ct. Rep. 30)."

The judgment of the Supreme Court of Arkansas, (R. 22), is as follows:

> "These causes came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County and were argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause."
>
> "It is, therefore, ordered and decreed by the Court that the decree of said Chancery Court in this cause be and the same is hereby in all things affirmed with costs."

The judgment of the Chancery Court of Pulaski County (R. 19) states:

> "On the facts alleged in the plaintiff's complaint, admitted in the answer of the defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the Court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.
>
> "Therefore, it is by the Court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed."

It is, therefore, apparent that neither the judgment of the Chancery Court or the Supreme Court of Arkansas affirmatively shows that a Federal question was necessarily involved, or decided.

In petition for rehearing, filed herein, (R. 28-29), counsel for Petitioner requested the Court to "clarify its opinion to show clearly that its opinion affirming the decision of the lower Court, holding that the Commis-

sioner * * * cannot collect the taxes on the transactions involved, is based solely on the proposition that a sales tax laid upon a purchaser cannot be collected on transactions in interstate commerce." The Court refused to modify the opinion. Evidently, counsel then held the view, for which we here contend, that the Arkansas Supreme Court did not base decision on the commerce clause. At least, counsel seemed to be in doubt and thought the opinion should be "clarified." In any event, although we steadfastly maintain that by no proper construction can it be said that the decision rests on any basis other than the positive declaration that the former decision in the Mann case controlled, nevertheless, if there be any doubt as to whether a Federal question formed the basis for decision, then, as we understand the settled rule, such doubt must be resolved in favor of Respondents, and the petition must be denied.

## THE BERWIND-WHITE CASE

Counsel seems to rest his whole case on the decision of this Court in *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U.S. 33, 84 L.ed. 565, 60 S. Ct. 388. In our opinion, it is without any bearing whatsoever.

It is, of course, naught more than the statement of an elementary rule to say that when the "Seller," in Memphis, delivered the goods to a common carrier, consigned to the purchaser in Arkansas, the sale and delivery to the purchaser was thereby accomplished, both in law and in fact.

*Louisville & N. R. Co. v. United States*, 267 U.S. 222, 45 S. Ct. 233.

The Berwind-White case, as well as its companion cases cited in brief of opposing counsel, involved facts entirely dissimilar and unrelated to the facts in the cases at bar. We quote the statement of facts made by the New York Court of Appeals, (281 N.Y. 610, 22 N.E. (2d) 173):

> "Petitioner, a Pennsylvania corporation, engaged in marketing and distributing bituminous coal *in New York City*, claimed immunity from the provisions of the sales tax law under the commerce clause of the Federal Constitution because the sources of the coal were in another state, *although all of the contracts were made, signed and executed within the City of New York, and possession and title were transferred within the City of New York.* Petitioner also contended as to a small portion of its sales that the fact that the contracts named delivery points outside of New York City, although actual delivery occurred within the City, resulted in the consummation of the sales outside of the City and so placed them beyond the scope of the law."

As is perfectly apparent, both by the facts statement above quoted, and as also set out in the opinion of this Court, the Berwind-White Company maintained a sales office in the City of New York, where they made contracts for the delivery of coal, and where, on a date subsequent, the possession and title thereof was transferred. In other words, every act done in the City of New York which would have *conditioned* the tax on a local sale, was, in the case at bar, done or performed in the City of Memphis. The offer, acceptance, and delivery were made within the territorial limits of New York, and, of course, were activities within its taxing power. In plain truth and unvarnished fact, the sales and deliveries were made

within the City of New York, and were, therefore, subject to its taxing powers. As we construe it, the decision rests solely on the ground that the City could impose, and had imposed, a tax upon local activities which occurred within the territorial limits of the taxing agency. This Court said:

> "The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption of tangible personal property and measured by the sales price. * * * * It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, consummated there, for the transfer of title, or possession."

But it is different in the cases at bar. The tax levied under both the New York and Arkansas Acts is conditioned upon the transfer of title, or possession. But, in the cases at bar, the Acts which "*conditioned*" the tax did not occur within the state, but did occur in Memphis, where the title and possession of the property passed.

What is the nature of the tax involved, and ultimately applied, in the Berwind-White case? Determination of this question serves to clarify the further question of the applicability of the decision, (if any it has) to the cases at bar. The New York Act provided:

> "The tax imposed hereunder shall have application only within the territorial limits; and, this Act shall not authorize the imposition of a tax on any transaction originating, and/or consummated outside of the territorial limits of (the city), notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Necessarily, under this provision, activities within the territorial limits, which conditioned the tax, must have occurred therein. The tax was laid on "purchasers for consumption," measured by the "Amount of the receipts from every *sale* in the City." "Sale" was defined as "any transfer of title or possession, by any manner, or method, or any agreement therefor." Therefore, in its very nature, design, application and effect, as is plainly manifest, the tax set up under the Act was a "*sales tax.*" Its purpose and design was to tax "sales," as defined, made within the taxable limits. And, so conforming it, its nature and character are not in anywise doubtful.

We further note (and emphasize) that in the Berwind-White case, there was involved two sales in a category similar in respect to the cases at bar. Austin-Nichols and Co. and The New England Steamship Company submitted to the New York office of the Berwind-White Company offers to purchase coal. As to Austin-Nichols, the delivery was to be made f.o.b. mines in Pennsylvania. As to the Steamship Company, delivery was to be completed at the pier of the Company in Jersey City. This Court refused to pass on these two sales and the case was remanded to the New York Court of Appeals for determination of the validity of the tax alleged to be due thereon. Thereafter, final judgment was entered in the New York Court of Appeals, in which it was conceded that the sales so made did not fall within the provisions of the taxing Act because they were made beyond territorial limits of the taxing agency.

In the Berwind-White case, this Court said that, "The only relation to commerce" arose from the fact that immediately preceding *transfer of possession within the*

*state*, the merchandise had been transported in interstate commerce and *brought to its journey's end.* Is the "relation to commerce" there involved, wherein the contracts which carried the title and right to possession to the purchaser were executed within the limits of the taxing agency, in any wise comparable to the "relation to commerce" herein involved, wherein every activity, which would condition the tax if the sale had been made in Arkansas, actually occurred in the City of Memphis, beyond the territorial limits? As we understand it, every activity occurring in the instant cases, in their combined and cumulative effect, have been held, since time immemorial, to constitute interstate commerce. Citations are deemed unnecessary.

The commerce clause (Sec. 8, Ar. 1) prohibits multiple taxation for the reason that such mode of taxation would place a burden on interstate commerce. If Arkansas be allowed to tax gross receipts on sales of goods made in Tennessee, upon delivery thereof to an Arkansas purchaser by his carrier agent who accepted delivery for him in Tennessee, then it ought to be conceded that the sale would also be taxable in Tennessee, where all acts which tended to consummate the sale occurred. Multiple taxation would, therefore, necessarily occur and the following decisions would be applicable. As said by the Supreme Court in *Adams Mfg. Co. v. Storen*, (304 U.S. 307, 58 S. Ct. 913):

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales."

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods were sold, as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of and burden upon, interstate commerce, prohibited by Art. 1, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and non-discriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

In *Simpson vs. Gundry*, 297 Mich. 403, the Court said:

"Sanction of the claim made by the State would make plaintiff a collector of a tax, in behalf of the State, upon merchandise, manufactured, sold and, in the course of interstate commerce, delivered in Chicago for carriage to owners thereof in the State of Michigan, and such cannot be done, for the law-making arm of the Legislature, *and much less that of a mere administrative official*, cannot reach into another State and mandate persons there to so serve. The use tax Act does not accomplish any such thing!

"In the case at bar the State seeks to impose a burden on interstate commerce, not in any manner connected with intrastate commerce, and this may not be done. Plaintiff needed no authorization to do business in the course of interstate commerce in this State and leave to do business in this State, unless an intrastate business is carried on and the in-

trastate and interstate business become associated, does not subject interstate commerce to any State imposed burden.

"Under the mentioned Federal decision, a foreign corporation doing business within this State, subject to a sales tax, is liable for the use tax upon goods shipped into State to residents as, in such case, the use tax is complementary as associated with the sales tax and not considered a burden upon what would otherwise be interstate commerce. The business here involved, upon which the State seeks to sustain the use tax, is the very business which we held in *J. B. Simpson, Inc., v. O'Hara, supra*, (277 Mich. 55) was not subject to the sales tax, and upon that point that decision is *res judicata*. So, disassociated, the business is strictly interstate commerce upon which the State may not impose the burden of the use tax or compel the plaintiff to collect same."

This Court denied certiorari (*Brown vs. Simpson*, 314 U.S. 674).

## CONCLUSION

We, therefore, respectfully submit, for the reasons hereinbefore stated, that the petition for Writ of Certiorari should be denied.

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